

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-6786

ALBERTA L. OSBORNE,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF OHIO
BRIEF FOR RESPONDENT IN OPPOSITION

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76-6786

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OPINION BELOW

The opinion below is reported at State v. Osborne 49 Ohio St. 2d 135, 359 N.E. 2d 79 (1977), and is correctly set forth in the appendix to the petition.

JURISDICTION

Jurisdiction is invoked by petitioner pursuant to Title 28 U.S.C., Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

1. DOES THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT VIOLATE THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?
2. IS THE RECORD OF TRIAL PROCEEDINGS, WHICH PETITIONER DID NOT SEEK TO SUPPLEMENT, CORRECT, OR MODIFY IN ACCORDANCE WITH THE RULES OF APPELLATE PROCEDURE, SO INADEQUATE AS TO PRECLUDE REVIEW OF THE ERRORS CLAIMED, AND DENY DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?
3. DO THE JURY INSTRUCTIONS ON THE ISSUE OF AIDING AND ABETTING, OR COMPLICITY, IN THE COMMISSION OF A CRIMINAL OFFENSE, WHICH WERE NOT OBJECTED TO BY PETITIONER, DENY DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

4. WAS PETITIONER AFFORDED A FAIR AND IMPARTIAL TRIAL BY JURY
UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION?

STATEMENT OF THE CASE

On December 15, 1974 Hermalee Ross was abducted from the parking lot of the Ontario Food Store, Columbus, Franklin County, Ohio. Her body, was recovered that same day at an abandoned school-house in Delaware County, Ohio. She had been severly beaten and had two gunshot wounds at the base of her head.

Investigation revealed that petitioner had a long standing illicit relationship with Edgel Ross, husband of the murder victim. Investigation also revealed that petitioner had hired her son, Carl, and James Weind to murder Mrs. Ross.

Petitioner was indicted by the Franklin County Grand Jury for Kidnapping (2905.01 O.R.C.), and Aggravated Murder (2903.01 O.R.C.). In compliance with Section 2941.14 O.R.C., the Aggravated, or First Degree, Murder counts in the indictment each specified the presence of two aggravating circumstances under section 2929.04(A) O.R.C. Those aggravating circumstances were that the murder was for hire (2929.04[A] [2] O.R.C.), and felony-murder (2929.04[A] [7] O.R.C. - Kidnapping).

At petitioner's jury trial the prosecution presented over thirty witnesses and introduced over forty exhibits into evidence. That evidence established petitioner's motive as the discarded lover in a triangle, attempting to eliminate her lover's wife. The State established that the murder weapon belonged to petitioner. Blood was found in her daughter's car, used in the offense, and on the shoe of Weind, her co-conspirator. Statements of the co-conspirator Weind during the course of the conspiracy were admitted under the applicable hearsay exception.

Petitioner's daughter, Kay, testified concerning petitioner's admission that, "she told me she had paid Carl and Jimmy to kill

Mrs. Ross." Bank records established a five hundred dollar (\$500.00) withdrawal from petitioner's account the day after the murder.

The Jury verdict found petitioner guilty of Aggravated Murder (2903.01 O.R.C.) and Kidnapping (2905.01 O.R.C.). The jury returned separate findings of guilt with respect to the aggravating circumstance of murder for hire.

A separate mitigation hearing was held pursuant to statute. The trial court found that there were no mitigating circumstances and imposed the death penalty.

Petitioner's conviction and sentence were affirmed by the Franklin County, Ohio Court of Appeals, Tenth Appellate District, and by the Ohio Supreme Court on an appeal as a matter of right.

The matter is before this court on the petition for writ of certiorari, alleging a violation of federal constitutional rights.

REASONS FOR DENYING THE WRIT

1. THE OHIO STATUTORY SCHEME FOR THE IMPOSITION OF CAPITAL PUNISHMENT IS CONSISTENT WITH THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION, WHICH FORBIDS CRUEL AND UNUSUAL PUNISHMENTS, AS APPLICABLE TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Introduction

Respondent, State of Ohio, respectfully submits that the statutory provisions, and procedure, for the imposition of capital punishment in Ohio are consistent with the cruel and unusual punishment clause of the Eighth Amendment to the United States Constitution, as applied to the States through the Fourteenth Amendment to the United States Constitution.

As separately discussed below, the death penalty in Ohio, as applicable to premeditated and felony-murder, when specified aggravating circumstances are present and no mitigating circumstances exist, is not so grossly disproportionate to the offense.

Nor is the penalty wantonly and freakishly imposed, in an

arbitrary or capricious manner, so as to run afoul of the Eighth Amendment or violate the dictates of Furman v. Georgia 408 U.S. 238 (1972). Specific guidelines, in the name of aggravating and mitigating circumstances, provide the necessary control on discretion, focusing on the offense and the offender.

As a constitutionally indispensable part of the process of inflicting the death penalty in the state of Ohio the circumstances, character, and record of both the offense and the offender are considered in conformity with this court's decisions last term in Gregg v. Georgia 428 U.S. 153 (1976), Proffitt v. Florida 428 U.S. 242 (1976), Jurek v. Texas 428 U.S. 262 (1976), Woodson v. North Carolina 428 U.S. 280 (1976), and Stanislaus Roberts v. Louisiana 428 U.S. 325 (1976).

Once convicted, a death penalty defendant has an appeal as of right under the Constitution of the State of Ohio to both an intermediate appellate court and the Ohio Supreme Court. The explicit nature of the specifications of aggravating circumstances and mitigating circumstances allows effective judicial review to assure that the penalty is imposed fairly and not arbitrarily.

For these reasons, fully set forth below, the Respondent submits that the framework for the imposition of capital punishment in the State of Ohio is constitutional.

1. The Crime

In the State of Ohio the only crime for which capital punishment may be imposed is Aggravated Murder (Section 2903.01 O.R.C.). The crime is analogous to what was formerly called First Degree Murder in Ohio (Section 2901.01, 1953 O.R.C.), and other states.

That statute provides:

"Sec. 2903.01 (A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting

to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder, and shall be punished as provided in section 2929.02 of the revised code."

The relevant culpable mental state of "purposely" is defined in Section 2901.22(A) O.R.C. as follows:

"Sec. 2901.22 (A) A person acts purposely when it is his specific intention to cause a certain result, or, when the gist of the offense is a prohibition against conduct of a certain nature, regardless of what the offender intends to accomplish thereby, it is his specific intention to engage in conduct of that nature,"

The death penalty may be imposed only for purposeful, planned murders and for purposeful killings during the course of designated felonies.

Unless the existence of an aggravating circumstance listed in Section 2929.04(A) O.R.C. is alleged in the indictment, the penalty for Aggravated Murder is life imprisonment. See Section 2929.03(A) and 2941.14(B) O.R.C.

2. Aggravating Circumstances

One, or more, of the seven aggravating circumstances listed in Section 2929.04(A) O.R.C. must be alleged in the indictment and proven beyond a reasonable doubt or the death penalty is precluded. See 2941.14(B) O.R.C.

The aggravating circumstances are as follows:

"(1) The offense was the assassination of the President of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or, of the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions

according to law to have his name placed on the ballot in a primary or general election, or is he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing or attempt to kill another, committed prior to the offense at bar, or, the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

Two of the aggravating circumstances deal with the status of the victim as a public official or a law enforcement officer. However, the status of the victim alone does not permit imposition of the death penalty, as did the statute considered in Harry Roberts v. Louisiana ____ U.S. ___, 20 U.S.L.W. 3083, 21 Cr. L. 3076 (rendered June 6, 1977).

The remaining five aggravating circumstances consider the nature, status, character, or record of both the offender and the offense committed.

In addition to the verdict as to the substantive offense of aggravated murder, the verdict must include separate findings as to the specification of aggravating circumstances. A guilty verdict for the crime, but not guilty as to the specified aggravating circumstance, results in a life sentence.

3. Procedure after conviction for the crime of aggravated murder and a finding of guilt as to an aggravating circumstance

The Ohio law provides for a bifurcated procedure in capital cases as to guilt and sentence. The jury, or a panel of three judges if right to trial by jury is waived, determines guilt or innocence as to the crime and the specified aggravating circumstances. The presiding Judge at a jury trial, or the three judge panel if jury is waived, determines sentence.

After conviction for the crime and an aggravating circumstance, the court must order a pre-sentence investigation and a psychiatric examination. Contrary to the practice in Gardner v. Florida ___ U.S. ___, 20 Cr. L. 3083, Section 2929.03(D) O.R.C. requires that copies of both the pre-sentence and psychiatric report be furnished to the offender or his counsel.

The pre-sentence investigation and report is prepared pursuant to Rule 32.2(B), Ohio Rules of Criminal Procedure, which provides:

"(B) Report

The report of the presentence investigation shall state the defendant's prior criminal record, the circumstances of the offense, and such information about defendant's social history, employment record, financial ability and means, personal characteristics, family situation, and present mental condition, as may be helpful in imposing or modifying sentence or providing rehabilitative or correctional treatment, and shall state such other information as may be required by the court. Whenever the court, probation officer, or investigator considers it advisable, the investigation may include a physical and mental examination of the defendant."

This report of the history, character, and record of the individual offender along with the circumstances of the particular offense is submitted to the sentencing authority.

A mitigation hearing is held to consider those reports, testimony, other evidence, and arguments on the subject of penalty which

should be imposed. The offender may make a statement to the court, which need not be under oath, and such is subject to cross-examination only if the statement is made under oath. See Section 2929.03(D) O.R.C.

The judge, or three judge panel if applicable, then considers all relevant information as it relates to the existence of one or more of the three mitigating circumstances set forth in Section 2929.04(B) O.R.C.

If a mitigating circumstance is shown to exist by a preponderance of the evidence the penalty is life imprisonment. If no mitigating circumstance is found to exist by a preponderence the death penalty is imposed. Section 2929.03(E) O.R.C.

4. Mitigating Circumstances

Section 2929.04(B) O.R.C. sets forth the relevant factors to be considered by the sentencing authority and the mitigating circumstances as follows:

"(B) Regardless of whether one or more of the aggravating circumstances listed in division (A) of this section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when, considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a prepondence of the evidence:

(1) The victim of the offense induced or facilitated it.

(2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.

(3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity."

As noted previously, the specified aggravating circumstances are directed to the offense and offender.

The statute as to mitigation likewise directs the attention of the sentencing authority to the nature, circumstances, character, and condition of the offender and the offense.

In State v. Bayless 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976), the first case upholding the Ohio death penalty statute, the court noted that this statute on mitigation and the mitigating factors, as with any legislation, may require judicial interpretation and clarification. Bayless, supra, at 86. The court further noted that these mitigating factors were to be strictly construed, in favor of the defendant, to allow the broadest consideration of the mitigating circumstances.

In the subsequent case of State v. Woods 48 Ohio St. 2d 127, 358 N.E. 2d 1059 (1976), the second branch of the syllabus, which is the law of the case, see Cassidy v. Glossip 12 Ohio St. 2d 17, 24, 231 N.E. 2d 64 (1967), set forth the meaning and standard to be utilized when considering duress or coercion as a mitigating circumstance under section 2929.04(B)(2) O.R.C. The court held that this circumstance was to be construed more broadly than the defense of duress, and that this mitigating factor turned on the circumstances of each individual case, including the character of the one sought to be influenced, supra, at 135, and the nature and circumstances of the offense, the history, character and the condition of the offender, so as to temper punishment out of consideration of the individual offender and his crime. Supra at 137, citing Williams v. New York 337 U.S. 241 (1949).

Likewise, in State v. Black 48 Ohio St. 2d 262, 358 N.E. 2d 551 (1976), in construing the third mitigating factor, the first branch of the syllabus held that the sentencing authority should use the broadest possible latitude in determining the offender's mental state or capacity. The second branch of that syllabus elaborated by stating that the offender's mental state should be considered in light of all the circumstances, including the nature of the crime. Against a claim that the mitigating term was not specifically defined, or was too narrow, the court stated that broadly defined and however evidenced any mental state or incapacity may be

considered in light of all the circumstances. Supra at 268.

In State v. Bell 48 Ohio St. 2d 270, 358 N.E. 2d 556 (1976), in the second branch of the syllabus, the court held that the age of the offender and prior criminal record are relevant factors to be considered in determining the existence of mitigating circumstances under section 2929.04(B) (2) and (3) O.R.C. In the opinion, the court indicated that age was a primary factor in determining the existence of a mental deficiency, both minority and senility being relevant. Supra at 282.

Thus it may be seen that all relevant information is, or may be, presented to the sentencing authority which by statute, and construction of the mitigating circumstances, then determines whether society's best interests are served by exacting the ultimate penalty. This decision is based on the circumstances of the particular offense and particular offender.

This procedure complies with the Eighth Amendment and the dictates of this court's decisions last term, with the Ohio procedure closely analogous to the procedure upheld in Profitt, supra, and Jurek, supra.

5. Appellate Review

The court of common pleas, in each of Ohio's eighty-eight counties, is the court with general and subject matter jurisdiction in Aggravated Murder cases for which the death penalty may be imposed.

A court of appeals, with geographical jurisdiction of one or more counties, reviews criminal convictions, judgments, and sentences from the court of common pleas. A defendant upon whom the death penalty has been imposed has an appeal as a matter of right to the court of appeals. Article IV section 3, Ohio Constitution. If a timely notice of appeal is not filed a defendant may seek review as a delayed appeal under Rule 5, Ohio Rules of Appellate Procedure.

A death penalty defendant has an appeal as a matter of right to the Ohio Supreme Court, where the conviction and sentence in a

a capital case has been affirmed by the Court of Appeals. Article IV, Section 2(B)(2)(a)(ii), Ohio Constitution.

An aggrieved defendant in a capital case, as a matter of right, may have his conviction reviewed by the Court of Appeals and the Ohio Supreme Court.

In State v. Bayless, 48 Ohio St. 2d 73, 357 N.E. 2d 1035 (1976) the Ohio Supreme Court noted its duties and responsibility in reviewing a capital case, supra at 86:

"[T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges."

Respondent would note that the explicit guidelines contained in the statutory framework for capital punishment facilitates this type of review.

As was noted in State v. Miller 49 Ohio St. 2d 198, 361 N.E. 2d 419 (1977) at 204:

"This statewide method of review does serve to insure against the arbitrary and uneven imposition of the death penalty."

Based on the foregoing, Respondent submits that appellate review in the state of Ohio will assure fairness and even imposition of the capital penalty.

6. Conclusion

For each of the foregoing reasons, briefly stated, the Respondent, State of Ohio, respectfully submits that the imposition of capital punishment, and the statutory procedures, do not run afoul of the Eighth Amendment, and the writ should be denied.

2. THE RECORD OF TRIAL PROCEEDINGS, AND THE RULES OF APPELLATE PROCEDURE, PROVIDED FOR FULL, COMPLETE AND ADEQUATE APPELLATE REVIEW OF ALL ERRORS CLAIMED BY PETITIONER AND DID NOT DENY PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT

Respondent would stipulate that the record of trial proceedings herein is far from perfect. However, the due process clause of the Fourteenth Amendment does not guarantee perfection. Respondent submits that the record is adequate to insure complete and full appellate review of the errors claimed by petitioner. Two appellate courts in the State of Ohio reviewed the record and found it adequate.

Petitioner has failed to point out to this court a specific instance where effective review of a claimed error is precluded. Nor did petitioner point to an instance where review was precluded by Ohio courts.

Moreover, were petitioner serious in this claim, Rule 9(E), Ohio Rules of Appellate Procedure, analogous to Federal Appellate Rule 10(E), provides a remedy whereby petitioner could modify, correct, or supplement the record. Petitioner failed to utilize this remedy, which failure belies the lack of merit for this alleged denial of due process.

For those reasons the respondent submits the writ should be denied.

3. THE INSTRUCTIONS TO THE JURY ON THE ISSUE OF AIDING AND ABETTING, OR COMPLICITY IN THE COMMISSION OF A CRIMINAL OFFENSE DID NOT DENY PETITIONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Ohio law provides that any person, acting with the requisite degree of culpability, who aids and abets the commission of a criminal offense is punishable as a principal. Section 2923.03 O.R.C. Such conduct is labelled "complicity" under Ohio law.

Holding a co-conspirator criminally liable is not a novel theory of criminal law. At common law such a person was called an accessory before the fact, and was punishable as a principal.

The United States government likewise proscribes such conduct, 18 U.S.C.A. section 2, as does every state in the union.

The jury instructions on this issue, taken as a whole, accurately set forth the law as it relates to aiding and abetting, or complicity, and did not deny due process.

Moreover, petitioner did not object to such instructions as required by Rule 30, Ohio Rules of Criminal Procedure, which is identical to the analogous Federal Rule, and may not claim error in such instructions.

For these reasons respondent submits that the writ should be denied.

4. PETITIONER WAS AFFORDED A FAIR AND IMPARTIAL TRIAL BY JURY UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS APPLIED TO THE STATES THROUGH THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As noted by the Ohio Supreme Court, the voir dire of prospective jurors lasted four days. Each juror who sat on petitioner's case stated under oath that no opinion as to petitioner's guilt had been formed and that they would base their verdict solely on the evidence.

The totality of the circumstances show no inherent prejudice in the trial setting, or procedure, or actual prejudice from the jury-selection process. See Murphy v. Florida 421 U.S. 794 (1975).

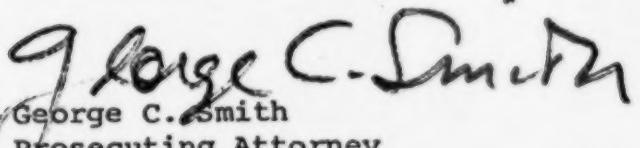
Petitioner was afforded a fair and impartial trial by jury under the Sixth and Fourteenth Amendments, and for that reason the writ should be denied.

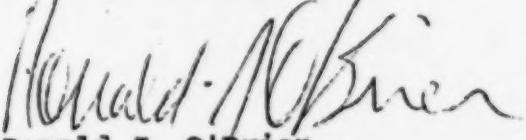
CONCLUSION

For each of the foregoing reasons the respondent, State of

Ohio, respectfully submits that the Petition for Writ of Certiorari
should be denied.

Respectfully submitted,


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CERTIFICATE OF SERVICE

Pursuant to Rule 33(3)(6) of the Rules of Practice of the Supreme Court, the undersigned, a member of the bar of the Supreme Court of the United States, hereby certifies that three (3) copies of the foregoing brief in opposition to the petition for a writ of certiorari were served upon James K. Hunter, III, Esquire, counsel for the petitioner, by mailing same to his office at 50 West Broad Street, Columbus, Ohio 43215, by United States Mail, postage prepaid, this 21st day of June, 1977, and upon Dennis B. Ehrie, Jr., Esquire, counsel for the petitioner, by mailing same to his office at 50 West Broad Street, Columbus, Ohio 43215, by United State Mail, postage prepaid, this 21st day of June, 1977. I further certify that all parties required to be served have been served.


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